

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LAMONT BIRDEN

Claimant

VS.

NATIONAL CARRIERS, INC.

Respondent

AND

**LUMBERMEN'S MUTUAL CASUALTY COMPANY
AND EMPLOYER'S INSURANCE OF WAUSAU**

Insurance Carriers

Docket No. 210,015

ORDER

Respondent and Lumbermen's Mutual Casualty Company request review of the preliminary hearing Order for Compensation entered by Special Administrative Law Judge William F. Morrissey on May 20, 1996.

ISSUES

- (1) Whether timely written claim was made.
- (2) Whether claimant sustained a series of accidental injuries which arose out of and in the course of his employment.
- (3) Whether there is Kansas jurisdiction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds that the Order granting preliminary benefits should be affirmed.

Claimant's Form E-1, Application for Hearing, alleges a series of accidents beginning October 16, 1993 and each continuing day worked thereafter. Claimant last worked on or about December 4, 1995. The Appeals Board finds two separate accidents. The first accident occurred on October 16, 1993. The second accident was a series which occurred each and every day claimant worked thereafter.

Claimant is an over-the-road tractor trailer truck driver. On October 16, 1993, he was involved in a multi-vehicle accident outside O'Fallon, Missouri. Claimant injured his low back in that accident. He was initially treated at the emergency room of a local hospital near O'Fallon, Missouri on the day of or the day following the accident. He was thereafter treated on October 26, 1993 on an outpatient basis at the University Hospital in his hometown of Syracuse, New York. He did not again seek medical treatment until December 4, 1995 when he reported to University Hospital with complaints of worsening back and hip pain together with weakness, numbness and tingling in his left leg. Claimant

subsequently was treated by Dr. Jalal Sadrieh, an orthopedic surgeon in Syracuse, New York.

Claimant testified that he telephoned Darrell Kirkwood, safety manager for respondent, on December 6, 1995 from Dr. Sadrieh's office. He advised Mr. Kirkwood that he was under Dr. Sadrieh's care for back pain stemming from his October 1993 accident and that he needed the name of respondent's workers compensation carrier and insurance policy number for Dr. Sadrieh to submit his treatment charges for payment. Thereafter, on December 15, 1995 an adjuster for respondent's workers compensation insurance carrier contacted claimant and obtained from him a recorded statement. Benefits were ultimately denied claimant by the workers compensation insurance carrier. While claimant was off work at the instructions of his treating physician, respondent terminated claimant and advised him that he was not eligible for rehiring.

A Form A, Employer's Report of Accident, dated November 2, 1993 was filed with the Kansas Division of Workers Compensation on November 15, 1993 reporting a low-back injury to claimant as a result of an October 16, 1993 truck wreck in O'Fallon, Missouri. The Employer's Report of Accident was completed for National Carriers, Inc., by Darrell Kirkwood, safety manager. The mailing address and location of the employer are shown thereon to be Liberal, Kansas. Claimant prepared a Form K-WC 15, Claim for Workers Compensation, on January 2, 1996 which was served on the respondent by certified mail, return receipt requested, on January 24, 1996. A Form E-1, Application for Hearing, was filed February 6, 1996 alleging a series of accidents beginning October 16, 1993 and each day worked thereafter. It is respondent's position that timely written claim was not made. K.S.A. 44-520a provides in part:

"(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation . . .

Although claimant clearly gave timely notice, it is not clear whether the employer filed its Report of Accident with the Division of Workers Compensation within twenty-eight days thereof as required by K.S.A. 44-557. If not, then claimant's time to file written claim would be extended to one year from the date of the last medical treatment authorized by the employer. See K.S.A. 44-557(c). Claimant does not contend that he presented any document to the respondent that could be construed as a written claim for benefits before January 24, 1996. That date is beyond 200 days and is also beyond one year from the October 16, 1993 accident. It appears that the treatment claimant received in October 1993 was authorized but that the treatment he received in December 1995 and thereafter was not. Accordingly, we find that more than 200 days and more than one year, whichever is applicable, elapsed from the date payment of compensation was suspended until written claim was served upon the employer for the accident of October 16, 1993. Written claim was, therefore, not timely for the October 16, 1993 accident.

Claimant also alleges personal injury by a series of accidents occurring each day worked after October 16, 1993. The medical records introduced as Claimant's Exhibit Birden 1 at the May 9, 1996 preliminary hearing do not specifically address the question of whether claimant suffered additional injury by accident after October 16, 1993 as a result of his regular work activities. It is respondent's position that if claimant's current complaints are work related, then they are a natural and probable consequence of his October 16, 1993 accident. Claimant disagrees. Claimant returned to work approximately 10 days after the October 1993 accident and continued to work until December 4, 1995 when he again sought medical treatment. He testified that during this period he was limited in the amount of unloading he was able to perform due to pain and stiffness in his back. Also, driving caused him increased pain and discomfort. Nevertheless, although his symptoms

progressively worsened, he was able to tolerate the pain until a couple of days before December 4, 1995 when he was driving and could not lift his left leg to push the clutch pedal in. At that point, claimant decided that he was becoming a hazard to himself and other people if he could not stop his truck. Claimant described this as a new problem in addition to the back, hip and leg pain he had been experiencing ever since the October 1993 accident. He further described those symptoms as having gotten progressively worse and more frequent leading up to his seeking medical treatment in December 1995. Claimant denied any activity or injury outside of work which could have caused or contributed to his condition. The history claimant gave at the emergency room of University Hospital on December 4, 1995 and that given to Dr. Sadrieh and to the physical therapist are consistent with claimant's preliminary hearing testimony.

The Kansas Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994) held:

"The date of accident or date of occurrence in a workers compensation action involving carpal tunnel syndrome is the last day on which a claimant performs services for his or her employer and is required to stop working as a direct result of the claimant's pain and disability resulting from carpal tunnel syndrome." (Syl. ¶ 3)

In Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995) the Kansas Court of Appeals expanded its holding in Berry to include other micro-trauma injuries of the type caused by continuing, repetitive activity over a period of time. The Court held because it is impossible to determine exactly when the injury or injuries have occurred "and because such injuries occur over a period of time, this type of condition is virtually the same for workers compensation purposes as carpal tunnel syndrome."

The Appeals Board finds, based upon claimant's uncontradicted testimony, that he did suffer an aggravation of his preexisting back condition each and every day worked following his return to work with respondent after his October 16, 1993 truck accident. Therefore, following the rule announced in Berry and Condon, the claimant's date of accident for the series of micro-trauma injuries is his last day worked. For purposes of preliminary hearing, claimant has established personal injury by accident arising out of and in the course of his employment by a series ending on or about December 4, 1995. Therefore, written claim was timely served on January 24, 1996.

It was respondent's contention before the Special Administrative Law Judge and it is argued to the Appeals Board that Kansas does not have jurisdiction over the claim because the motor vehicle collision of October 16, 1993 occurred in Missouri, claimant's contract of hire was in Missouri and the destinations of the loads claimant carried were in 48 states and Canada. Claimant, on the other hand, contends that his contract of hire was at respondent's office in Liberal, Kansas; that he was always dispatched from the Liberal office; and that his loads all originated from Kansas, such that his principal place of employment was at all times Kansas.

While we know that claimant's October 16, 1993 accident occurred in Missouri, we do not know where claimant's subsequent series of accidents occurred. Although claimant's loads all originated in Kansas, he delivered the boxed beef product to all 48 states and Canada. The jurisdiction of the Kansas Workers Compensation Act is controlled by K.S.A. 44-506 which provides:

"The workmen's compensation act shall not be construed to apply to business or employment which, according to law, is so engaged in interstate commerce as to be not subject to the legislative power of the state, nor to persons injured while they are so engaged: *Provided*, That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides"

The Special Administrative Law Judge found Kansas jurisdiction based upon a Kansas contract of hire and because the principal place of employment was in the state of Kansas. The Appeals Board finds Kansas jurisdiction based upon a finding that the principal place of employment is within the state. Accordingly, we need not reach the question of where the contract of employment was made. In addition to the claimant's testimony concerning his principal place of employment, we note that in respondent's Motion to Change Venue filed March 21, 1996 there appears the following statement as Paragraph No. 2 in support of said Motion: "The Respondent has its principal place of business in Liberal, Seward County, Kansas." This statement is consistent with claimant's testimony that his contacts with respondent were through its Kansas office and that he considered Kansas to be his principal place of employment.

Therefore, although claimant drove in all 48 contiguous states and Canada, the Appeals Board finds his principal place of employment was in Kansas because all of claimant's loads originated in Kansas, claimant was dispatched out of Kansas and Kansas was claimant's nexus to respondent. Kansas, therefore, has jurisdiction of this workers compensation claim.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the May 20, 1996 Order for Compensation of Special Administrative Law Judge William F. Morrissey should be, and the same is hereby, reversed as to the accident occurring October 16, 1993 and affirmed as to the series of accidents ending on or about December 4, 1995.

IT IS SO ORDERED.

Dated this ____ day of August 1996.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
Denise E. Tomasic, Kansas City, KS
David J. Bogdan, Overland Park, KS
Shirla R. McQueen, Liberal, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director